

SENATE RECORD VOTE ANALYSIS

106th Congress
1st Session

Vote No. 206

July 15, 1999, 12:09 p.m.
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HEALTH INSURANCE REFORM/Right to Treatment Instead of Lawsuits

SUBJECT: Patients' Bill of Rights Act . . . S. 1344. Gregg amendment No. 1250 to the Collins amendment No. 1243.

ACTION: AMENDMENT AGREED TO, 53-47

SYNOPSIS: As introduced, S. 1344, the Patients' Bill of Rights Act, contains the text of S. 6, a health insurance regulation bill proposed by Senator Kennedy and other Democrats. The bill: will regulate the structure and operation of all health insurance products at the Federal level; will impose extensive mandates on consumers, health insurers, and employers; and will create new rights to sue employers and insurers for unlimited compensatory and punitive damages. As estimated by the Congressional Budget Office (CBO), this Democratic plan will cause insurance premiums to rise by an average of 6.1 percent (which will be in addition to any increases from inflation or other causes). The 6.1-percent cost increase, which will total \$72 billion over 5 years, will cause approximately 1.8 million Americans to lose their health insurance coverage.

The Collins amendment would expand the deductibility of long-term care to individuals, would expand direct access to obstetric and gynecological care, would provide timely access to specialists, and would expand patient access to emergency medical care (see vote No. 207 for details).

The Gregg amendment would strike the section of the Kennedy bill that would expose employers and insurers to unlimited compensatory and punitive damage suits. (The Employee Retirement Income Security Act (ERISA) of 1974 governs pension plans and employee welfare benefit plans, including group health plans. ERISA limits the legal actions that may be taken against both self-funded and fully insured group health plans. Those limits include that it prohibits the award of punitive or compensatory damages against the plans or plan sponsors. Suits may be filed in Federal court, and damages may be paid equal to the cost of the plan benefits under dispute. Attorney fees and court costs may be awarded as well. The Federal Employee Health Benefits Program (FEHB) has the same limits. About 124 million Americans are covered by private group health plans. Case law is not completely clear on the extent to which ERISA preempts legal actions under State law against private group health plans. In general, courts have found that State law is not preempted when the question relates to the quality of care given for a covered benefit, but it is when it relates to a question of coverage or administration.) The Kennedy bill would amend ERISA to allow unlimited compensatory and punitive

(See other side)

YEAS (53)		NAYS (47)		NOT VOTING (0)	
Republicans (53 or 96%)	Democrats (0 or 0%)	Republicans (2 or 4%)	Democrats (45 or 100%)	Republicans (0)	Democrats (0)
Abraham	Hutchinson	Fitzgerald	Akaka	Kennedy	
Allard	Hutchison	Specter	Baucus	Kerrey	
Ashcroft	Inhofe		Bayh	Kerry	
Bennett	Jeffords		Biden	Kohl	
Bond	Kyl		Bingaman	Landrieu	
Brownback	Lott		Boxer	Lautenberg	
Bunning	Lugar		Breaux	Leahy	
Burns	Mack		Bryan	Levin	
Campbell	McCain		Byrd	Lieberman	
Chafee	McConnell		Cleland	Lincoln	
Cochran	Murkowski		Conrad	Mikulski	
Collins	Nickles		Daschle	Moynihan	
Coverdell	Roberts		Dodd	Murray	
Craig	Roth		Dorgan	Reed	
Crapo	Santorum		Durbin	Reid	
DeWine	Sessions		Edwards	Robb	
Domenici	Shelby		Feingold	Rockefeller	
Enzi	Smith, Bob (I)		Feinstein	Sarbanes	
Frist	Smith, Gordon		Graham	Schumer	
Gorton	Snowe		Harkin	Torricelli	
Gramm	Stevens		Hollings	Wellstone	
Grams	Thomas		Inouye	Wyden	
Grassley	Thompson		Johnson		
Gregg	Thurmond				
Hagel	Voinovich				
Hatch	Warner				
Helms					

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

damage suits under State law for personal injury or wrongful death. Suits could be brought against an employer if the employer exercised "discretionary authority" in the action that caused the alleged harm. Suits could be brought for medical or other actions that allegedly caused harm. The CBO has estimated that this provision would increase liability costs for most employer-sponsored health plans by 70 percent to 90 percent, and a Chamber of Commerce survey of small businesses found that 57 percent of them would stop providing health insurance to their employees if the Kennedy bill provisions were enacted. The Gregg amendment would also express the sense of the Senate: that American families want and deserve quality health care; that patients need health care before they are harmed rather than compensation provided long after an injury has occurred; that the expansion of medical malpractice liability lawsuits would divert precious resources away from patient care and into the pockets of trial lawyers; that health care reform should not result in higher costs for health insurance and fewer insured Americans; and that providing a fast, fair, efficient, and independent grievances and appeals process will improve quality of care and patient access to care. Finally, the amendment would make several findings, including that the CBO has estimated that the Kennedy bill liability provisions would raise health insurance premiums by an average of 1.4 percent.

Those favoring the amendment contended:

"Medical malpractice litigation has become an onerous and protracted means to resolve medical malpractice disputes. The costs are escalating with less of the medical insurance premium dollar going to compensate the injured party. The delays in resolving such disputes average up to 4.5 years from filing of a lawsuit. Litigation has failed to prove an efficient means to achieve a fair result for all concerned." Who made that statement? Was it some "right wing" Republican? Was it the non-partisan CBO? No, it was our liberal friend, Senator Kennedy. He made that statement when ERISA was first being considered, and Democrats were arguing for limiting lawsuits against employer-provided health plans. Democrats wanted to encourage the growth of such plans, particularly managed care plans. Largely as a result of ERISA, most Americans who now have private health insurance have it through employer-sponsored HMOs. HMOs focus on providing care efficiently and on providing preventive care. As HMOs have become the dominant form of private health care in America, some problems have naturally emerged. Some HMOs, in their efforts to hold down costs, have been guilty of practices that have caused severe harm. Our Democratic colleagues have seen the polling data showing that Americans are rightly angered by those abusive practices. Their reaction, in the Kennedy bill, is to propose giving lawyers an unlimited license to bring suits against both insurance companies and employers. This license would not undo any injury, bring anyone back to life, or even provide fair or adequate compensation for injuries. It would, however, enrich ambulance-chasing trial lawyers, raise insurance costs for 124 million Americans, and cause many employers to drop insurance coverage altogether.

Our colleagues claim that the license to sue that their bill would create already exists for Federal employees and in the State of Texas, which they say passed the same language. On both counts they are wrong. Federal employees have precisely the same limits applied to them as are applied to Americans covered under employer-sponsored plans. On the second count, Texas passed similar language, and only the sections which relate to quality withstood court challenge.

Lawsuits are a poor way to provide protection. They typically take 4 years or more to resolve. Lawyers usually refuse to even consider cases for injuries of less than \$50,000. Most recoveries for debilitating injuries are inadequate to cover lifetime losses, medical awards are spread over several years, and victims rarely get more than half the awards. Lawyers take 40 percent to 50 percent, and another large chunk goes to pay court costs. In no case does getting a payment undo the injury or death.

The Republican bill would take a better approach. It would focus on preventing the harm in the first place. It would require any disputes over the appropriate treatment for covered medical care to be resolved quickly through a binding internal and independent external review process. In emergencies, when care was needed quickly, decisions would be required within 72 hours or even more quickly if necessary. In cases of malpractice, the right to sue would obviously still exist. Unlike the Democratic bill, the Republican bill would provide a rush to medical care instead of a rush to the courthouse. It clearly offers a better alternative. We urge our colleagues to support the Gregg amendment to strike the lawyer enrichment provisions of the Kennedy bill.

Those opposing the amendment contended:

In America, only two groups cannot be sued: diplomats and HMOs. Of the two groups, HMOs are by far the most deadly. We have heard countless horror stories of the harm that has been caused by penny-pinching bureaucrats at HMOs who put dollars ahead of lives. For instance, Florence Corcoran lost her baby because her HMO refused her doctor's request to hospitalize her at the end of a difficult pregnancy. The Fifth Circuit court of appeals threw out her suit against that HMO because it said that ERISA shielded group health plans from liability. As a simple matter of justice we need to remove this shield. Removing it would not have much cost. We know that Federal employees have this benefit, that the citizens of Texas (by State law) now have it, and that both Medicaid and Medicare patients have it. Those rights to sue have not resulted in any increases in cost or losses in coverage, so we do not see why they would if we applied them to employer-sponsored health plans. Further, we note that if HMOs knew they could be sued, they would be more caring in their treatment of their patients in the first place. In our opinion, this section on lawsuits may be the most important part of this bill. We strongly urge our colleagues to vote against the Gregg amendment to strike it.